



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 23, 1994

Mr. Kenneth R. Stein  
Law Offices of Matthews, Carlton & Stein, L.L.P.  
Four Forest  
12222 Merit Drive, Suite 800  
Dallas, Texas 75251

OR94-187

Dear Mr. Stein:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 23909.

The Cherokee County Sheriff's Department (the "county") received an open records request for, *inter alia*, two specific custodial death reports and "any other records that relate to deaths of inmates in the custody of the Cherokee County Sheriff's Department" since January 1, 1989. This office has previously ruled, citing Open Records Decision No. 521 (1989) as authority, that sections two through five of one of the custodial death reports must be withheld pursuant to article 49.18(b) of the Code of Criminal Procedure. *See* Open Records Letter No. 93-354 (1993). Although you have not submitted to this office a copy of the second requested custodial death report, we nevertheless hold that, for the reasons cited in Open Records Letter No. 93-354, sections two through five of the second report must also be withheld.

We note, however, that Open Records Letter No. 93-354 did not specifically rule on whether section one of the custodial death report on Michael Gene Garner is subject to required public disclosure and that the ruling might be interpreted as holding that the county could withhold section one pursuant to former section 3(a)(3), V.T.C.S. article 6252-17a (now found at section 552.103(a) of the Government Code). In Open Records Decision No. 521 at 5, this office held that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, section one of custodial death reports filed with this office is public information. *See* Code Crim. Proc. art. 49.18(b) ("The attorney general shall make the report, with the exception of any portion of the report that the attorney general determines is privileged,

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<sup>1</sup>The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

*available to any interested party.*") (emphasis added). Information specifically made public by statute may not be withheld from the public pursuant to section 552.103(a). Open Records Decision No. 161 (1977) at 2 and authorities cited therein. Consequently, to the extent that Open Records Letter No. 93-354 implies that the county may withhold section one of that custodial death report, it is modified. Accordingly, the county must release section one of both of the requested custodial death reports.

We now address whether the records you have submitted to this office for review are excepted from required public disclosure. With regard to the custodial death of Michael Gene Garner, you seek to withhold pursuant to the "litigation" exception, section 552.103 of the Government Code, particular records that the county created or received subsequent to the issuance of Open Records Letter No. 93-354. In Open Records Letter No. 93-354, we held that because you had demonstrated that the likelihood of litigation regarding that death was more than mere conjecture, the records that were the subject of that ruling came under the protection of former section 3(a)(3). For the same reason, we now hold that the county may also withhold the records pertaining to this death that you have submitted to this office as Exhibit "E."

You state that you anticipate litigation against the county regarding the death of Robbie Lynn Jacobs because 1) the injuries he received while in custody resulted in his death, 2) the county does not believe that it has any liability in connection with this death, 3) the county believes that the family members of Mr. Jacobs have begun to investigate the circumstances surrounding his death, and 4) the circumstances surrounding Mr. Jacobs' death are "sufficiently similar" to those of Mr. Garner's death so as to justify anticipation of litigation.

We do not believe that you have adequately demonstrated a reasonable likelihood of litigation with regard to the death of Robbie Lynn Jacobs so as to bring the contents of Exhibit "F" within the protection of section 552.103(a). As noted in Open Records Decision No. 521 at 6, not all custodial deaths result in litigation. To demonstrate that litigation is reasonably anticipated, a governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Open Records Decision No. 452 (1986) at 4 and authorities cited therein. The above enumerated facts, even when taken together, do not constitute a concrete showing that the county may reasonably anticipate litigation regarding Mr. Jacobs' death at this time. We find that you have not met your burden under section 552.103(a) with regard to these documents. We therefore must determine whether the documents contained in Exhibit "F" come under the protection of the other exceptions you raise.<sup>2</sup>

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<sup>2</sup>You contend the requested records constitute work product and thus come under the protection of sections 552.103 and 552.107 of the Government Code. In the context of open records requests, the work product doctrine merely represents one aspect of section 552.103 of the Open Records Act. See Open Records Decision No. 574 (1990). Because you have not adequately demonstrated that the requested records relate to reasonably anticipated litigation, the county may not withhold these records as attorney work product under section 552.103.

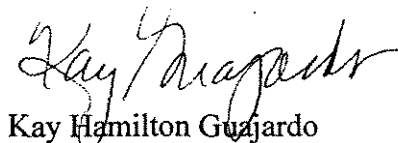
You contend that the records contained in Exhibit "F" come under the protection of former section 3(a)(7), V.T.C.S. article 6252-17a (now found at section 552.107 of the Government Code). Although you are correct that this section protects information that is the subject of a protective order, *see* Gov't Code § 552.107(2), you have not demonstrated that the information at issue here is currently the subject of any existing protective order.<sup>3</sup> Consequently, section 552.107(2) is inapplicable here.

Section 552.107(1) protects information coming within the attorney-client privilege. *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice to his client and confidential attorney-client communications. *Id.* After reviewing the records in Exhibit "F," we believe that only portions of Documents 2 and 3 contain the types of information protected by section 552.107(1). We have marked those portions for your convenience. The county may not withhold any of the remaining information pursuant to section 552.107.

Finally, you contend that former section 3(a)(11), V.T.C.S. article 6252-17a (now found at section 552.111 of the Government Code) protects the records in Exhibit "F." This section excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. Except for the legal opinions that are otherwise protected by section 552.107(1), the information at issue consists of purely factual information that may not be withheld under this section. *See id.* Accordingly, the county may withhold from the public only those portions of Exhibit "F" that we have marked as coming under the protection of section 552.107(1); the county must release all remaining information in Exhibit "F."

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hamilton Gujardo  
Assistant Attorney General  
Open Government Section

KHG/RWP/rho

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<sup>3</sup>We do not address here the extent to which the information contained in Exhibit "F" would properly come under the privileges you raise in your brief. Information is privileged only to the extent a court in a particular case deems it to be so. Open Records Decision No. 575 (1990) at 2.

Ref.: ID# 23909

Enclosures: Marked documents

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